No. 82-1544

In The
Supreme Court of the United States

OCTOBER TERM: 1982

In The Matter Of
FIRST COLONIAL CORPORATION OF AMERICA

FIRST COLONIAL CORPORATION OF AMERICA,
Petitioner,

v.

AMERICAN BENEFIT LIFE INSURANCE COMPANY,
Defendant.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Supplemental Appendix

of

First Colonial Corporation of America

Respectfully submitted
BY ATTORNEY

FRANZ JOSEPH BADDOCK
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SUPPLEMENTAL APPENDIX

(As requested by the Clerk's Office of the Supreme Court of the United States, this Supplemental Appendix includes the Opinions and Decrees of the United States District Court for the Eastern District of Louisiana, from which Decrees Appeals were taken to the United States Court of Appeals for the Fifth Circuit.)

NOTE: Since the last page of the Appendix in the Petition for Certiorari is Page 30, the Page Numbers in this Supplemental Appendix begin with Page No. 31.

MINUTE ENTRY
MARCH 3, 1982
COLLINS, J.

CIVIL ACTION

IN THE MATTER OF:
FIRST COLONIAL CORPORATION OF AMERICA

NO. 81-409

SECTION "C"

MARCH 12, 1982

* * * * * * * * * * * * * * * *

This matter is before the court on the petition of Franz J. Baddock, Esq., Trustee in Bankruptcy of First Colonial Corporation of America ("First Colonial"), requesting this court to appoint a Receiver for First Colonial in order to preserve the residue which now exists after the satisfaction of all claims and expenses in the First Colonial bankruptcy proceeding.

WHEREFORE, after due consideration of the arguments of counsel, the submitted memoranda, and the applicable law, the court hereby DENIES Trustee's petition for an appointment of a Receiver by this court.

/s/ ROBERT F. COLLINS
UNITED STATES
DISTRICT JUDGE

REASONS

On December 10, 1980, the Trustee filed a complaint in the United States District Court for the Middle Dis-

trict of Louisiana, seeking the appointment of a Receiver to preserve the residue which now exists after the satisfaction of all claims and expenses in the First Colonial bankruptcy proceeding and to preside over anticipated future litigation involving that residue. The bankruptcy proceeding, Docket No. BK 70-334, was administered by the Bankruptcy Court of the Middle District of Louisiana. A subsequent appeal was filed and passed upon by the Fifth Circuit Court of Appeal. *In the Matter of First Colonial Corp. of America*, 544 F.2d 1291 (5th Cir. 1977). The Trustee's instant petition seeking appointment of a Receiver was first allotted to Chief Judge Parker of the Middle District of Louisiana. Chief Judge Parker recused himself on the grounds that he had appeared in the past as counsel of record for one of the interested parties. The Trustee's petition was then reallotted to United States District Court Judge Polozola. On December 18, 1980, Judge Polozola signed an interim Order requiring that the residue from the bankruptcy proceedings be preserved in a bank account at the Louisiana National Bank of Baton Rouge, Louisiana. However, on December 29, 1980, by Minute Entry, Judge Polozola recused himself from this matter without assigning reasons. Judge Polozola in the same Minute Entry rescinded his prior Order of December 18, 1980. On January 27, 1981, Chief Judge Parker ordered that this matter be transferred to the Eastern District of Louisiana because both he and Judge Polozola had recused themselves. The case was then transferred to this District and reallotted to this Section of court.

A conference between the court and the Trustee was held on February 5, 1981. At that time, the Trustee

urged the court to appoint a Receiver, as prayed for in the Trustee's petition. The Trustee also informed the court that American Benefit Life Insurance Company, a claimant to the residue, had successfully petitioned the Nineteenth Judicial District Court, for the Parish of East Baton Rouge, to appoint James J. Zito as Temporary Receiver for First Colonial. Further, the Trustee informed the court that on February 3, 1981, Harvey H. Posner, Bankruptcy Judge, Middle District of Louisiana, ordered the Trustee to deliver control of the residue to James J. Zito. The Trustee further informed the court of his intention to appeal Judge Posner's Order of February 3, 1981.

The Trustee appealed Judge Posner's Order of February 3, 1981. On appeal this court, in its Memorandum Opinion of March 4, 1982, determined that the Order directing the Trustee to surrender and deliver the residual assets of the bankrupt estate to the Receiver; close the estate; and be discharged as Trustee, was well within the bankruptcy judge's broad, equitable, discretionary powers. Additionally, this court found that such Order did not manifest clear error to warrant reversal. Consequently, the bankruptcy judge's Order of February 3, 1981 was affirmed.

The above determination mandates that this court dismiss the instant petition. The bankruptcy judge's Order, being upheld by this court on appeal, obligates the Trustee to surrender and deliver the residual assets to the Receiver, close the estate, and be discharged as Trustee. If this court were to grant Trustee's prayer and appoint a second receiver, it would be appointing an offi-

cial whose duties, obligations, and responsibilities would be in direct conflict with those of the duly appointed Temporary Receiver. This would be inconsistent with this court's earlier ruling upholding the bankruptcy judge's recognition and adoption of the state appointed Receiver. In light of its earlier determination, this court fails to see the necessity of appointing a new receiver. Consequently, the instant petition should be dismissed.

This matter is hereby DISMISSED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: FIRST COLONIAL CORPORATION OF AMERICA, Bankrupt

CIVIL ACTION

NO. 81-694

SECTION "C"

MARCH 10, 1982

* * * * * * * * * * * * * * * * *

MEMORANDUM OPINION

Appeal from the United States Bankruptcy Court of the Middle District of Louisiana; Harvey H. Posner, Bankruptcy Judge.

This is an appeal by Franz J. Baddock, the trustee in bankruptcy of First Colonial Corporation of America ("First Colonial"), from the order of the bankruptcy judge directing the trustee to surrender and deliver the residual assets of the estate of First Colonial (the "Estate") to a temporary receiver appointed by the Nineteenth Judicial District Court of the State of Louisiana, close the Estate, and be discharged as trustee. The material facts, stated as briefly as possible, are as follows:

First Colonial was adjudged bankrupt September 8, 1970, on the basis of an involuntary petition filed by the trustee.[1] Because it appeared that First Colonial possessed viable causes of action against several corporations and private individuals, the trustee instituted several plenary suits on behalf of the Estate.

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[1] First Colonial was abandoned by its officers and board of directors in 1969.

After approximately two years of discovery and pretrial maneuvering, the plenary suits were consolidated for trial. On June 28 and July 1, 1974, shortly after the trial had begun, the district court directed the trustee to settle all of the bankrupt's claims for $600,000. Although the trustee and his attorneys strenuously objected, because they believed that a much larger recovery would result if the cases proceeded through trial, the court concluded that further prosecution of the suits would not benefit the creditors and that failure to accept the settlement promptly would delay, and possibly place in jeopardy, receipt by the Estate of an asset sufficient to satisfy all of the claims timely filed by creditors. *Matter of First Colonial Corp. of America*, 544 F.2d 1291 (5th Cir.), *cert. denied*, 431 U.S. 904 (1977). Accordingly, a settlement was entered, pursuant to which all of the creditors of the bankrupt were paid. After payment of all creditors and administration fees, a residual of $216,664.49 cash and certain other relatively insignificant assets remained.

In 1974, the Orleans Civil District Court appointed John B. Fournet, the former Louisiana Supreme Court Chief Justice, as Temporary Receiver for First Colonial. The Fournet receivership was objected to by the trustee on the basis that such receivership was ineffective from its inception because of improper venue. In an effort to appease the trustee and speed the conclusion of the bankruptcy administration, American Benefit Life Insurance Company ("American Benefit"), a disputed shareholder of First Colonial and claimant to the residue, after being permitted to intervene in this matter, procured the appointment of James J. Zito as Temporary

Receiver for First Colonial, in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, a court of proper jurisdiction and venue.

In early January, 1981, American Benefit filed its Motion for Delivery/Surrender of Residual Assets. This motion was filed to precipitate a conclusion of the bankruptcy action. Judge Posner, the bankruptcy judge who has handled this matter from its inception, ordered the trustee to show cause on February 3, 1981, why he should not surrender the residual assets to the Temporary Receiver.

A hearing was had on that afternoon, and the court, after considering the pleadings, the record, and the arguments of counsel, entered the Order of February 3, 1981 (the "Order"). The Order directed Baddock to surrender and deliver the residual assets of the Estate to the Temporary Receiver; close the Estate; and be discharged as trustee. It is from this Order that the present appeal was taken.

DISCUSSION

This court, sitting as a review court in the case at bar, is restricted to the "clearly erroneous" standard of review with respect to the bankruptcy judge's findings and ruling that the trustee should surrender and deliver the residual assets of the estate to the state appointed receiver. The bankruptcy court's factual findings and determination must be affirmed unless clearly erroneous; the test for the reviewing court is not whether a different conclusion from evidence would be appropriate, but whether there is sufficient evidence in the record to prevent clear error in the bankruptcy judge's findings and

determination. *Matter of Baldwell*, 610 F.2d 228 (5th Cir. 1980); *Matter of Boydston*, 520 F.2d 1098 (5th Cir. 1975); *In re Hunt*, 496 F.2d 882 (5th Cir.), *rehearing denied*, 502 F.2d 1167 (1974).

A proceeding in bankruptcy is a proceeding *in rem* against the estate of the debtor. *Straton v. New*, 283 U.S. 318, 321, 51 S.Ct. 465, 75 L.Ed. 1060 (1931). As such, the bankrupt estate is within the jurisdiction of the bankruptcy court which must dispose of the entire estate. "The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as *in costodia legis* from the filing of the petition." *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300, 307, 32 S.Ct. 96, 99, 56 L.Ed. 208 (1911). On the question of the exclusiveness of the jurisdiction of the bankruptcy court in all "proceedings in bankruptcy" the Supreme Court stated in *United States Fidelity & Guaranty Co. v. Bray*, 225 U.S. 205, 217, 32 S.Ct. 620, 625, 56 L.Ed. 1055 (1912):

> We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection, and reconsideration of claims, the reduction of the estates to money, and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them.
>
> . . . . . .
>
> A distinct purpose of the bankruptcy act is to sub-

> ject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy.

To accompany the bankruptcy courts' jurisdiction in "all proceedings in bankruptcy," said courts were also given the widest equity powers in such matters by section 2 of the Bankruptcy Act of 1898, 11 U.S.C.A. §11(15). Clause 15 grants them authority to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title."

Thus, the bankruptcy court in this matter had exclusive jurisdiction over the property of First Colonial and ancillary jurisdiction to determine any controversy between third parties as to the title and ownership of that property. The bankruptcy court also had authority to bring in all parties necessary for the complete determination of the controversy and the broad equity powers to take such action necessary for the effective administration of the estate. *Berl v. Crutcher,* 60 F.2d 440 (5th Cir.). *cert. denied,* 287 U.S. 670 (1932).

During the latter part of 1980, the trustee filed his Final Accounting and Report. That accounting established that the Estate had been fully administered and all debts paid. A residual of $216,664.49 cash and certain other relatively insignificant assets remained. The disposition of this surplus is the subject of this present dispute.

Except by necessary implication, the Bankruptcy Act, 11 U.S.C.A. §1 *et. seq.*, makes no provision for the disposal of a surplus remaining after payment of the costs of administration and all creditors in full. This is based on the fact that the bankruptcy law and all machinery for carrying it into effect is predicated on insolvency. This was aptly noted by the court in the seminal case *In re Lenox*, 2 F.2d 92 (W.D. Pa. 1924):

> The Bankruptcy Law (Comp. St. §§ 9585-9656) and all machinery for carrying it into effect is predicated on insolvency. As defined in the act, a person is insolvent when the aggregate of his property shall not at a fair valuation be sufficient in amount to pay his debts. Insolvency is a jurisdictional fact, upon which every proceeding in bankruptcy must be based. In a voluntary petition, the bankrupt must make oath of his inability to pay his debts in full, and his willingness to surrender all his property for the benefit of his creditors, except such as is exempt by law. Adjudication follows only on the finding by the court of such fact. In involuntary proceedings, if the alleged bankrupt denies insolvency, the petition will be dismissed on the finding of this fact. In other words, insolvency, inability to pay his debts in full, is the basis of the whole proceeding, and the act of Congress in all its provisions has reference to that situation. The equitable distribution of all the insolvent's property among his creditors is the end and purpose of the law. The act did not contemplate, and therefore did not provide for the disposition of, a balance in the hands of the trustee after the payment of creditors in full. In such a situation, where in fact all the creditors are paid in full, every principle of equity would require the payment of such balance to the bankrupt, not because of any provision in the

> Bankruptcy Act, but because equity would clearly demand it.

Id. at 93.

"The whole purpose of the bankruptcy system is to make the bankrupt's property available to his creditor and give back any surplus to him." 3A *Collier on Bankruptcy* ¶66.03 at 2327, n.8 (14th ed. 1971). Accordingly, cases have consistently held that under general equity principles, surplus monies held by the trustee and remaining unclaimed after the payment of all properly filed claims and costs of administration should be returned to the bankrupt. *See, e.g., Hendrie v. Lowmaster*, 152 F.2d 83, 85 (6th Cir. 1945); *Wheeling Structural Steel Co. v. Moss*, 62, F.2d 37, 40 (4th Cir. 1932); *Berl v. Crutcher*, 60 F.2d at 444; *In re Silk*, 55 F.2d 917, 918 (2nd Cir. 1932); *Johnson v. Norris*, 190 F.459, 462 (5th Cir. 1911); *cert. denied* 232 U.S. 723, 34 S.Ct. 479, 58 L.Ed. 815 (1914); *see generally*, 6 Remington, *Bankruptcy Law*, §2890 (5th ed. 1952). "[I]f the bankrupt is a corporation and its corporate existence has been terminated, the [c]ourt, in the exercise of its equity jurisdiction, may provide for such surplus to be distributed to its stockholders." *Hendrie v. Lowmaster*, 152 F.2d at 85 *citing Berl v. Crutcher* and *Johnson v. Norris*.

In the performance of its duty to turn the surplus over to the bankrupt, it was necessary for the bankruptcy court to determine who were the stockholders. The judge was faced with the request that the residual assets of the Estate be turned over to a temporary receiver, who was appointed by a state court to serve as a representative of the stockholders of the defunct corpo-

ration. Only after an extensive hearing on the matter, whereby the bankruptcy court permitted the trustee to demonstrate why he should not be required to surrender the assets to the temporary receiver, and only after examining the authority and qualifications of James J. Zito to act as temporary receiver, did the bankruptcy judge direct the trustee to surrender the residual assets of the estate to the temporary receiver. Such action was well within the bankruptcy court's jurisdiction and was a proper exercise of the bankruptcy judge's discretion.

Appellant contends, however, that a bankruptcy court is not authorized to appoint a receiver for a corporation, once all proceedings under the bankruptcy act are terminated. This contention is without merit. As stated by this circuit in *Berl:*

> Except by necessary implication, the Bankruptcy Act makes no provision for the disposal of a surplus of the property surrendered remaining after payment of the costs of administration and all creditors in full, but in the exercise of its equity jurisdiction it is the duty of the court to return it to the bankrupt. *Johnson v. Norris* (C.C.A.) 190 F.459, L.R.A. 1915B, 884. As this is a part of the administration of the bankrupt's estate, the returning of the surplus is a proceeding in bankruptcy.

60 F.2d at 444.

The propriety of appointing receivers and fashioning equitable solutions to instances where a surplus exists after payment of all debts and expenses was also recognized by the court in *Berl:*

> In the performance of its duty to turn the surplus over to the bankrupt, it was necessary for the Dis-

> trict Court to determine who are the stockholders. The propriety of appointing a receiver to hold that surplus in the interim is apparent. In the exercise of their equity jurisdiction, courts of bankruptcy may appoint special masters to facilitate the trial of issues before them. *In re Lacov* (C.C.A.) 134 F.237. There could be no doubt that the appointment of a master was necessary in this case, as neither the trustee nor the referee would be vested with jurisdiction to determine the ownership of the stock by virtue of their respective offices. Whether the corporation is to be continued or the surplus distributed to the stockholders is a matter to be decided in the future. With that we have no concern on this appeal.

Id.

The fact that the temporary receiver was appointed by a state court does not diminish the bankruptcy judge's broad equitable authority to adopt and recognize the temporary receiver as the proper representative of the defunct corporation, to whom the residual assets should be turned over. Bankruptcy does not of itself destroy the jurisdiction of state courts. It is competent for the court of bankruptcy to permit administration to go on in them. *Ex parte Baldwin*, 291 U.S. 610, 54 S.Ct. 551, 78 L.Ed. 1020; *Connell v. Walker*, 291 U.S. 1, 54 S.Ct. 257, 78 L.Ed. 613. It is usual and proper for federal courts to defer to prior state court proceedings to the extent of relinquishing jurisdiction to them, especially where the suits, like those dealt with in this proceeding, are brought by a state in respect of its fiscal affairs. *Pennsylvania v. Williams*, 294 U.S. 176, 55 S.Ct. 380, 79 L.Ed. 841, 96 A.L.R. 1166; *Penn General Gas*

Co. v. Pennsylvania, 294 U.S. 189, 55 S.Ct. 386, 79 L.Ed. 850.

Furthermore, this court finds no danger of conflict in the bankruptcy court's Order. Such a conflict would exist and be inappropriate if the Temporary Receiver and the trustee, both allegedly acting in the interests of creditors and as officers of the court, were permitted to quarrel over the administration of the Estate. The prospect of such a dispute in the case of *In re Empire Finance Corp.*, 1 F.Supp. 298 (N.D. Cal. 1932), was undoubtedly the reason for the court's holding that the bankruptcy court had no general equity power to appoint a receiver who would oppose certain facets of the trustee's administration.

In this case, however, although not officially discharged, the trustee's responsibilities to administer the Estate have virtually come to an end. All of the creditors and administrative expenses have been paid in full. The trustee has filed his Final Accounting and Report representing that the Estate had been fully administered and all debts paid. Thus, the only thing remaining is the residual assets, which all parties agree should be returned to the bankrupt. Once the bankruptcy court exercised jurisdiction over the remaining assets and, in its effort to return the property to the bankrupt, ordered the residual assets turned over to the Temporary Receiver, the Estate closed, and the trustee discharged, the trustee's responsibilities in this matter terminated. Hence, there exists no possibility of conflict as contemplated by *In re Empire* that would preclude the bankruptcy judge from exercising his equity powers.

Again, all parties in this matter agree that the residual assets should be returned to the bankrupt. The only question remaining is who is the proper party to represent the bankrupt corporation. The corporation had been inactive for a period in excess of ten years. A review of LA.REV.STAT.ANN. §12:151(A)(2) (West) makes it clear that a state court has jurisdiction to appoint a receiver to take charge of the corporation's property when it is found that said property had been abandoned, or that the shareholders had failed to elect directors, or that there was no known authority to take charge of the corporation's affairs.

American Benefit sought and obtained a receivership pursuant to state law and then petitioned that the Estate be closed and the residual assets be turned over to that receiver for disposition in accordance with law.

The trustee's position is that if it was necessary to appoint a receiver, then a receiver should have been appointed by a federal district court. In fact, the trustee has outstanding an application to this court for the appointment of a federal receiver. Thus far, this court has declined to act upon said request until the matter concerning the appointment of the state court receiver is resolved. This court has no quarrel with the fact that a federal receiver could have been appointed, *see, e.g., Berl v. Crutcher*, 60 F.2d at 440, but finds that this was not the exclusive method of resolving the matter. It is the opinion of this court that a state court receivership provides an equally permissible course of action, especially in a case such as this, where the administration of the estate

has been unnecessarily prolonged. A major purpose of the bankruptcy law is to subject the administration of the estates of bankrupts to the control of tribunals charged with the responsibility of proceeding to final settlement and distribution in an efficient and speedy manner. Parties involved are entitled to have this authority exercised, and justly may complain when, as here, the remaining part of the administration is sought to be effected through the slower and less appropriate process of the appointment of a receiver by this court, that until now has had no connection with this case.

First Colonial was adjudged bankrupt on September 8, 1970, well over eleven (11) years ago. Justice requires that this matter be brought to a speedy conclusion. The Court has concluded that the nature of the appeal at bar indicates the desirability, if not the necessity, of the bankruptcy judge bringing this matter to a rapid determination by handing the residual assets over to the Temporary Receiver. *In re Pennsylvania Central Brewing Co.*, 135 F.2d 60 (3rd Cir. 1943).

The primary purpose of the Bankruptcy Act is to equitably, promptly, and economically collect the bankrupt's assets, convert them into cash and distribute them among creditors, and then to permit the bankrupt to start afresh free from obligations and responsibilities consequent upon business misfortune. *Ritholz v. Indiana State Board of Registration*, 45 F.Supp. 423 (N.D. Ind. 1942). The bankruptcy judge, acting within the spirit of the Act, attempted to bring this matter to a close by exercising his broad, equitable, discretionary powers and ordering the trustee to turn over the re-

sidual assets to the temporary receiver, close the Estate, and terminate his responsibilities as trustee. This court, sitting as a review court, finds that the bankruptcy judge's Order was well within his discretion, and such Order did not manifest clear error so as to warrant reversal. Consequently, the bankruptcy judge's finding and determination of February 3, 1981 must be affirmed.

RECUSAL

The issue of recusal is for the first time being urged by the trustee in his appeal. The question of whether the bankruptcy judge should have recused himself below, for whatever reason, had not been raised before the lower court. Consequently, this court need not entertain the merits of this contention.

The question of recusal is governed by 28 U.S.C. §144, which provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Notwithstanding the above provisions, the trustee cannot at this stage of the proceedings raise the issue of recusal when not one word was written or spoken regarding recusal during the proceedings below. This is especially true since Judge Posner appointed Baddock as trustee of the estate and the trustee served under his direction for more than ten years and no mention was ever made of recusal. The issue was not raised, no evidence was entertained concerning the matter, and no opportunity was given to make a record. The trustee cannot now ask this court, sitting as a reviewing court, to enforce 28 U.S.C.A. §455(a) and Bankruptcy Rule 505(b)(2) without any basis for doing so appearing in the record. The Fifth Circuit recently reiterated the necessity of timeliness in *Weber v. Coney*, 642 F.2d 91 (5th Cir. 1981):

> Ms. Weber's complaint to us that Judge Black should have disqualified himself in the case is wide of the mark in several respects. It is untimely because she filed the motion to disqualify about one year after the case was assigned to Judge Black, about four months after the case was transferred to Judge Gibson, and three days after Judge Gibson rendered a final judgment. *See* 28 U.S.C. §144.

Accordingly, this court determines that trustee, having failed to raise the issue of recusal in the proceedings below, is estopped from raising that issue in these appellant proceedings.

The decree below will be affirmed.

New Orleans, Louisiana, this the 4th day of March, 1982.

/s/ ROBERT F. COLLINS
UNITED STATES
DISTRICT JUDGE

MINUTE ENTRY
MARCH 3, 1982
COLLINS, J.

IN RE: FIRST COLONIAL CORPORATION OF AMERICA,
Bankrupt

CIVIL ACTION

NO. 81-694

SECTION "C"

MARCH 10, 1982

* * * * * * * * * * * * * * * *

This matter is before the court on American Benefit Life Insurance Company's Motion to Disqualify Judge filed January 20, 1982.

Counsel for both parties in this matter have represented to the court that they have no objections to this court ruling on the aforementioned Motion, since the alleged acts that form the basis for such Motion are that of the Judge's law clerk, and not of the Judge. Additionally, counsel have waived a hearing on this matter and have agreed that disposition of the Motion should be based upon the Motion itself, the Trustee's response to the Motion, and affidavits and memoranda filed by the parties. Accordingly,

IT IS HEREBY ORDERED AND ADJUDGED that the Motion to Disqualify filed by American Benefit Life Insurance Company is DENIED.

/s/ ROBERT F. COLLINS
UNITED STATES
DISTRICT JUDGE

REASONS

Pursuant to 28 U.S.C.A. §455(a) and 28 U.S.C.A. §144, American Benefit Life Insurance Company has submitted the present motion for disqualification. As argued by opposing counsel, and this court agrees, the case law interpreting the above statutory provisions require that disqualification of a judge be predicated on the inappropriate actions of such judge, as opposed to the inappropriate actions of his law clerk.

In this instance, the movant has raised the issue of my disqualification because of alleged comments made by one of my law clerks. The motion with its supporting affidavits and memorandum make plain that the complaint is lodged against my law clerk, and the only purpose of the motion is to determine whether my law clerk's alleged misconduct was authorized by me or in any way reflected my thoughts and position about this case:

> American Benefit further alleges that Mr. Williams has a bias and/or prejudice towards American Benefit . . . and accordingly, a hearing should be held to determine whether his spoken words express the views of Judge Collins.

Motion to Disqualify Judge at p. 3.

> In support of this motion, we have attached and submitted the affidavit of American Benefit Life Insurance Company . . . stating that the motion is made in good faith and so as to determine if the spoken words and representations of Charlester Williams express the views of Judge Robert F. Collins.

Memorandum in support of Motion to Disqualify Judge at p. 1.

The alleged misconduct of my law clerk, if true, was unauthorized and not sanctioned by this court. Moreover, the law clerk's alleged misconduct does not reflect any bias or prejudice shared by this court with regard to any party in this matter, nor does it affect the court's ability to render a fair and impartial decision.

The alleged mistatements of my law clerk arose out of an over-zealous attempt to expedite the disposition of this case, a matter which all parties agree has been unnecessarily prolonged. Although opposing counsel found nothing wrong in my law clerk's attempt to unravel the procedural haze that exists in this matter and expeditiously conclude the case, counsel for American Benefit filed this motion because of alleged mistatements made by the clerk during such attempts. In any event, assuming that the alleged mistatements were made, such mistatements were a product of an attempt to clarify the issues between the parties, that would have hopefully enabled this matter to come to a speedier conclusion. The alleged mistatements in no way addressed or concerned the merits of this case. Consequently, such mistatements do not indicate any bias or prejudice shared by my law clerk or this court with respect to any party in this case, nor does it affect this court's ability to render a fair and impartial decision in this matter.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF
FIRST COLONIAL CORPORATION OF AMERICA

NO. 81-694

SECTION "C"

MARCH 31, 1982

* * * * * * * * * * * * * * *

JUDGMENT

This matter came on for hearing on March 25, 1981. Franz Joseph Baddock, Trustee for First Colonial Corporation of America, appeared as appellant. Floyd J. Falcon, Jr. appeared for American Benefit Life Insurance Company, appellee. The Court, after considering the law, the evidence, and the entire record, and further after considering the briefs submitted by the respective parties, is of the opinion that the decree below should be affirmed, and accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that the Judgment rendered by the Honorable Harvey H. Posner, Bankruptcy Judge for the Bankruptcy Court of the Middle District of Louisiana on December 3, 1980, is affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the cash and noncash assets which were turned over to the Clerk of the United States District Court for the Eastern District of Louisiana for deposit and investment as per the instructions of the Court by Order dated March 27, 1981, be delivered to James J.

Zito, Temporary Receiver for First Colonial Corporation of America.

New Orleans, Louisiana, this the 29th day of March, 1982.

/s/ ROBERT F. COLLINS
UNITED STATES
DISTRICT JUDGE

B-7627, 3-83, 50

CERTIFICATE OF SERVICE

I certify under Rule 28.5. that I have this date, by prepaid mail, forwarded three (3) copies of the foregoing Supplemental Appendix to MR. FLOYD J. FALCON, JR., Attorney, Avant & Falcon, P. O. Box 2667, Baton Rouge, Louisiana 70821, who is counsel of record for American Benefit Life Insurance Company, as required by Rule 28.3.

I further certify under Rule 28.5. that all parties to this proceeding required to be served have thus been served, and that other than AMERICAN BENEFIT LIFE INSURANCE COMPANY AND PETITIONER, there are no other parties to this proceeding.

BATON ROUGE, Louisiana, March 30, 1983.

/s/ FRANZ JOSEPH BADDOCK